

Lieberman



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Fidelity Technologies Corporation
File: B-234517
Date: June 15, 1989

DIGEST

Protest is sustained where procuring agency awarded a contract set aside for small and disadvantaged business (SDB) concerns to a firm which was determined by the Small Business Administration (SBA) not to be socially or economically disadvantaged. Since SBA determined that the awardee was a concern which was ineligible for award because it was not controlled by a qualifying disadvantaged person, the continued performance of the contract is inconsistent with the purpose of the SDB set-aside program.

DECISION

Fidelity Technologies Corporation protests the award of contracts at four sites to Gray Multitech, Inc., under request for proposals (RFP) No. DAEA08-88-R-0008, a total small disadvantaged business (SDB) set-aside, issued by the Army for telecommunications services in the Southwest region. Fidelity asserts that Gray does not qualify as a socially or economically disadvantaged firm for this procurement, and that the Army prejudiced Fidelity's right to challenge Gray's SDB status by failing to provide unsuccessful offerors the required preaward notification of the intended award to Gray.

We sustain the protest.

The RFP, issued on March 4, 1988, called for proposals to provide telecommunications services at six different Army installation sites. Eight firms submitted proposals and Gray was determined to be the low-priced, technically acceptable offeror at four of the six sites. Fidelity was next-in-line at one of these four sites. On December 1, 1988, without providing advance notice to any of the unsuccessful offerors, the Army awarded these four site contracts to Gray, and the remaining two site contracts to

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Communications International, Inc. (CII). The awards are for a base year ending September 30, 1989, with 4 option years. On December 1, 1988, the same day, the Army notified Fidelity of the award. On December 2, Fidelity complained to the contracting officer that the preaward notice had been omitted, and that it believed that Gray was a "front" operation which did not qualify as an SDB. The contracting officer advised Fidelity that it could file a protest regarding the awardee's SDB status with the Army, which would be forwarded to the Small Business Administration (SBA) for resolution.

While the Army initially took the contrary position in its report on the protest, the Army now concedes (in its supplemental report) that during these discussions the contracting officer also advised Fidelity that, in the event of an SBA determination that Gray did not qualify as an SDB, the Army would terminate the four contracts with Gray. On December 5, Fidelity filed its protest with the Army that Gray did not qualify as an SDB. The Army forwarded the protest to the SBA, but permitted Gray to continue to perform. On January 4, 1989, SBA determined that Gray did not qualify as an SDB for the purposes of this procurement. SBA found that the individual who purportedly controlled Gray's management and daily business operations, and upon whom Gray based its SDB eligibility, did not possess the necessary management and technical expertise to control the day-to-day activities of the firm for the purposes of the referenced solicitation. SBA further determined that these skills rested with a non-disadvantaged Gray employee, who was also the highest compensated employee of the firm. The Army appealed the decision on January 13 and, on January 27, SBA denied the appeal.

On February 7, the Army advised Fidelity that the SBA determination that Gray did not qualify as an SDB did not apply to the instant procurement and that the Army would not terminate the extant base-year contract awards. However, the Army further indicated that it would not exercise Gray's options and that it would recompetete those requirements as SDB set-asides. Fidelity timely protested this notice with our Office on February 15.

The Army concedes that it improperly failed to provide preaward notice to Fidelity of the apparently successful SDB offeror, as is required under section 219.302(2) of the Department of Defense Federal Acquisition Regulation Supplement (DFARS). The Army states that this omission resulted from its "error" in failing to realize that such notice was required for SDB set-asides. There was no

written determination that the urgency of the requirement necessitated award without delay. Further, while the Army report indicates that by December 1 the incumbent had already been performing for an extended period at terms "unfavorable" to the government, and had begun to phase out and was not obligated to resume performance, the record does not establish that the contracting officer could or would have made an urgency determination had he realized that such a determination was necessary to avoid the notice requirement. The Army indicates that it will not exercise any of the options under the protested awards and will resolicit these requirements, but contends that because the awards were made in good faith the protest should be denied. We disagree.

The notice requirement under the DFARS is clearly intended to permit unsuccessful offerors to timely protest the SDB qualification of the apparently successful offeror in a time frame which will permit relief in the event that the challenge is found meritorious by the SBA. See Hamilton Enterprises, Inc., B-230736.6, Dec. 20, 1988, 88-2 CPD ¶ 604. Section 219.302(4) of the DFARS requires that upon receipt of an SDB status protest, the contracting officer shall withhold award and forward the protest to the SBA. Award may be made only if the contracting officer determines in writing that an award must be made to protect the public interest, or if the SDB certifies that within the 6 months preceding submission of its offer it was determined to be socially and economically disadvantaged by SBA and no circumstances have changed to vary that determination. In this case, neither criterion was met.

The Army's decision not to terminate Gray's contracts after it received SBA's decision was based on its belief that SBA's determination regarding Gray's SDB status was inapplicable to the instant procurement because it was received by the Army after award had been made. In its report the Army now concedes the applicability of the SBA determination to this procurement.

DFARS § 219.302(6) does provide that if the SBA determination is not received by the contracting officer within 15 business days after the SBA's receipt of the protest, it shall be presumed that the challenged offeror is socially and economically disadvantaged. However, the regulation also provides that this presumption may not be used as a basis for award without first ascertaining when a determination can be expected from SBA and, where applicable, waiting for the determination unless further delay in award would be disadvantageous to the government. Here, the SBA did take slightly longer than 15 business days to issue its

decision. However, this did not provide the contracting officer with a basis for making the award since he neither checked with the SBA nor made the additional required determination.

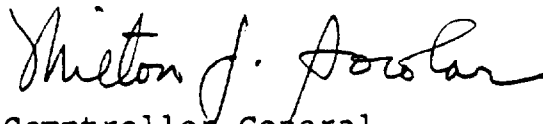
Accordingly, the Army consistently treated Fidelity's protest of Gray's SDB status as timely, never took any steps which would justify an award notwithstanding the protest, and also caused the protester to reasonably believe that the Army would cancel Gray's contracts if the SBA found that Gray did not qualify as an SDB. Under these circumstances, whether or not the Army acted in good faith is of no consequence.

The Army contends that no purpose would be served by requiring it to terminate the contract awards to Gray. We disagree. The purpose of the SDB set-aside program is for the Department of Defense (DOD) to place a fair proportion of its acquisitions with SDB concerns and to maximize the number of such entities participating in DOD contracts. DFARS § 219.201(a). The SDB set-aside regulations were promulgated in response to section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816 (1986), which established a DOD goal of awards to SDBs of 5 percent of the dollar value of total contracts to be awarded by DOD for fiscal years 1987, 1988 and 1989. Here, the SBA finding with respect to Gray constitutes a clear and unequivocal final determination (not subject to review by our Office) that Gray is not an eligible socially and economically disadvantaged firm because it is controlled by an individual who does not meet the requisite criteria. In our view, permitting an award to remain in place for the base year with a non-SDB concern which erroneously self-certified under a total SDB set-aside in which seven other apparently qualified SDB concerns competed would serve to undermine the primary purpose of the SDB set-aside program.

The Army also argues that termination would have a serious and adverse effect on the government. However, the Army offers no support other than to indicate that the services are necessary. The Army points out that a 30-day phase-in period is provided under the solicitation to acclimate new employees and to familiarize these new employees with the equipment. The Army offers no specific basis for this time period and Fidelity states that its employees could be on site within 24 hours and that the telephone equipment in question is conventional and requires minimal familiarization time--a matter of several days. CII, which is next-in-line for award at two of the sites in question, appears to be performing the services satisfactorily at the sites where

it was awarded contracts, and states that it would have no difficulty taking over performance at other sites in an expeditious and non-disruptive manner. Under the circumstances, we find that the Army should determine whether Fidelity is otherwise eligible for award, and whether Fidelity's and CII's prices are reasonable for those sites where they are next-in-line. Where these determinations are affirmative, we recommend termination of Gray's base year contracts and award to Fidelity and CII. In the absence of any information concerning the offeror next-in-line for the fourth site in question, we recommend that Gray be permitted to complete that base year contract, but that the options not be exercised and the requirement be recomputed under a new solicitation. In addition, since Gray has already performed a substantial portion of the services--more than one-half of the work under the base year contract--and Fidelity will be unable to compete for that portion of the award because of the Army's improper actions, we find that Fidelity is entitled to the costs of preparing its proposal, as well as to the costs of filing and pursuing the protest, including attorneys' fees. Hydro Research Science, Inc.--Reconsideration, B-228501.2, Apr. 29, 1988, 88-2 CPD ¶ 418. Fidelity should submit its claims for these costs directly to the Army. 4 C.F.R. § 21.6(f).

The protest is sustained.



Acting Comptroller General
of the United States